Supreme Court, U.S.
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No. 99-252

In the Supreme Court of the United States

COMBUSTION ENGINEERING, INC., *Petitioner*

v.

LOIS A. MCGILL, SAMUEL CLARY MCGILL, KATHERINE MCGILL LAMAR, JENIDA S. MCGILL, INEZ M. MCWHORTER, KATHLEEN MCGILL BEGGS, CHERRY MCGILL ROWLAND, EUGENE H. MCGILL, JR., JAMES CURTIS MCGILL, ELIZABETH BEVEL MCGILL, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) . . . . *passim*

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PETITIONER'S REPLY BRIEF

The petition for certiorari sets forth the reasons why this case is an ideal vehicle for refining the due process analysis applicable to claims of excessive punitive damages. The case involves conduct that was found by both lower courts not to be reprehensible, yet the decision below upholds a punishment that stands at 100 times the compensatory damages and bears a comparably extreme relationship to the civil penalty considered by the expert agency to be an adequate and appropriate response to the precise conduct at issue. It thus squarely presents the recurring question of the circumstances under which a large ratio of punitive to compensatory damages is permissible and, relatedly, the range of ratios that is allowable when such circumstances are not present.

Respondents do not deny that the lower courts have expressed and generally manifested confusion regarding the application of the *BMW* factors and that the decision below (and several decisions of state high courts) cannot be reconciled with decisions of other federal courts rejecting ratios of the magnitude involved here. Instead, respondents attempt to distract the Court from the growing conflict over the reasonable relationship guidepost by presenting a view of the facts that was rejected by both courts below (for good reason), by claiming that the ratio here isn't really 100:1 (which would certainly surprise both lower courts), and by focusing on a justification for the ratio that was not invoked by either of the lower courts.

Yet when all of the smoke generated by respondents is cleared away, the fact remains that the Eleventh Circuit upheld a $4.35 million punishment that was 100 times the compensatory damages, even though it agreed with the district court that the conduct was not reprehensible. Given the rationale invoked by the Eleventh Circuit — that Georgia has a strong interest in deterring environmental torts (which, for some unarticulated reason, is not deemed satisfied by the civil penalty imposed by its own expert environmental regulatory agency) — the decision below, if left undisturbed, threatens to eviscerate *BMW* by effectively espousing the principle that virtually any

ratio is acceptable in furtherance of a state's general interest in deterring torts. The Court's intervention is needed to prevent the erosion of *BMW* and would be immensely valuable by providing needed guidance as to the proper application of the reasonable relationship guidepost.

1. Respondents devote almost ten pages of their opposition to an inaccurate, one-sided presentation of the facts. They attempted to sell a similar version of the facts to the courts below, but the district court, after overseeing the trial, reviewing the record, and reading the briefs, flatly rejected respondents' factual assertions. It instead expressly concluded that "Combustion had actively attempted to prevent acidic water from entering the streams emanating from its property," that "Combustion's most egregious conduct was the failure to do more to prevent the acidic water problem," that "Combustion did not act with intentional malice," that "[t]he evidence does not suggest that Combustion affirmatively engaged in prohibited conduct of any kind after it reacquired the property" — in short, that "it is absolutely clear * * * that the degree of reprehensibility in this case is not very severe." Pet. App. 34a, 35a, 38a. After reviewing the record for itself, the court of appeals concluded that the district court's "finding that CE's conduct was not highly reprehensible is not clearly erroneous." *Id.* at 22a.

In suggesting that the record reflects that CE engaged in egregious misconduct, respondents are thus continuing to fight a battle they have long since lost. There therefore is no need for us to respond to the many mischaracterizations of the record contained in their brief.[1] The case comes to the Court as one

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[1] If the Court nevertheless desires to confirm for itself that respondents' presentation of the facts is unreliable, the reply brief we filed the first time this case was before the Court (No. 95-1072), demonstrates the inaccuracy of several of the same factual assertions that respondents make here.

(continued...)

involving low reprehensibility. It thus cleanly presents the issue of whether and when a large ratio is justifiable in a low reprehensibility case.

2. Respondents assert (Opp. 15-17) that this case is not a good vehicle for addressing the reasonable relationship issue because CE has settled with several of the original plaintiffs, leaving "only" one $1 million punitive judgment remaining.

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[1] (...continued)

There is, however, one misrepresentation about the subsequent history of the case that we cannot allow to go unanswered. Respondents assert (Opp. 2) that the district court and court of appeals each twice determined that CE acted with a specific intent to cause harm. In fact, the district court did not expressly address the "specific intent" issue when it acted on the original post-trial motions. Rather, it first mentioned the point on remand, expressly stating at that time that "there is no direct evidence of specific intent to cause harm in the record of this case" and hypothesizing that the jury "must have inferred specific intent from a finding of deliberate indifference to the consequence of [CE's] actions." Pet. App. 35a. The court did not purport to agree with the jury (since the issue of the applicability of the Georgia cap was no longer before it). Indeed, its finding that CE "actively attempted to prevent acidic water from entering the streams" and its conclusion that "it is ***absolutely clear*** * * * that the degree of reprehensibility in this case is not very severe" (*id.* at 34a, 38a (emphasis added)) strongly suggest that the court did not agree that there was a specific intent to cause harm.

There is likewise no basis for saying that the court of appeals twice found an intent to injure. When the case first came to the court of appeals, respondents asserted that CE had failed to preserve the cap issue by not moving for JMOL at the close of all the evidence. Because the Eleventh Circuit affirmed without opinion, there is no way to know whether it reached the merits of CE's cap argument. The second time the case was before the Eleventh Circuit, the only issue was constitutional excessiveness. The court thus had no occasion to consider whether the evidence supported a finding of intent to cause harm.

But the settlements change nothing of relevance. The fact remains that the punitive damages are 100 times the compensatory damages and 100 (instead of 435) times the fine actually imposed by the EPD. Those ratios present the issue every bit as starkly as if the settlements hadn't taken place.

3. Respondents claim (Opp. 17) that, because they perceived state law to require them to forgo a claim for diminution in market value in order to pursue an injunction, their compensatory award understates their injury and that this case therefore is not really a good candidate for refining the reasonable relationship guidepost. To begin with, the question of the extent to which uncompensated harm should be considered in the analysis would, if anything, make this case a better vehicle for addressing the complications that arise in applying the reasonable relationship guidepost. But, in fact, no such complicating factor is involved here. There is no evidence in the record that respondents suffered any diminution in the value of their property. Although respondents blame CE for that, no evidence is no evidence, whatever the reason, and the remedy for the erroneous exclusion of evidence is a new trial, not a resort to speculation.

In any event, respondents are simply wrong in blaming CE for their failure to introduce evidence of diminution in market value. To be sure, CE contended at trial that such evidence was irrelevant to the plaintiffs' chosen measure of *compensatory* damages. That was the only purpose for which the plaintiffs proffered this evidence. They never suggested to the district court that they believed this evidence to be relevant to the determination of punitive damages, an argument that would have supported its admission only in the *second phase* of this bifurcated trial. Fault for that omission was theirs alone.[2]

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[2] It bears noting that, if accepted, respondents' argument would allow them the benefit of an unproven assumption that their property

(continued...)

Finally, we note that the plaintiffs made this point to both lower courts, neither of which found it sufficiently persuasive to use as a justification for the 100:1 ratio that each explicitly endorsed.

4. Respondents also contend (Opp. 18) that the value of their claim for injunctive relief should be included in the denominator of the ratio. This argument also was made and implicitly rejected below — for good reason. The fact that respondents have the Damoclean sword of an injunction hanging over CE's head means that there is less need for a high punitive award, not more. In any event, here again, to the extent the possibility of an injunction is relevant one way or the other, it makes the case a more, not less, attractive candidate for certiorari.

5. Respondents next assert (*ibid.*) that the attorneys' fees and costs that the plaintiffs were *jointly* awarded should be included in the denominator of their ratio.[3] This argument was made to and implicitly rejected by both courts below. This rejection may have been based simply on a factual finding that plaintiffs' harms did not include litigation costs: CE had argued against inclusion of the fees and costs in the denominator on the ground (among others) that there was no evidence that the plaintiffs (as opposed to their contingent fee lawyers) had incurred the fees or advanced the costs and hence that these fees

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[2] (...continued)
did in fact suffer a permanent loss of value. Given that the streams make up only a tiny percentage of the acreage owned by respondents and that their predecessor in interest testified that the harm to their stream occurred *during mining* — *i.e.*, outside the limitations period — (Tr. 607-608), respondents' unsubstantiated assumption is in fact highly implausible.

[3] Respondents' apportioned share of the fee award is less than $17,500.

and costs had not been shown to be part of plaintiffs' injury.[4] But even if the argument was rejected as a matter of law and therefore remains open, the presence of a question whether to add litigation costs to the numerator, the denominator, or neither simply makes this case a more useful vehicle for providing guidance on the reasonable relationship guidepost. See generally *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").[5]

6. Having rehashed all of their old arguments about additional amounts that should be added to the denominator, respondents then make the new argument that the ratio is "meaningless" because "the use-and-enjoyment damages sustained by plaintiffs were difficult to quantify." Opp. 18. They insist (*id.* at 18-19) that the jury undervalued the loss and that "[t]he evidence showed that the injury sustained by plaintiffs was severe." Needless to say, neither the jury nor the district court nor the court of appeals agreed with their assessment of the evidence. See, *e.g.*, Pet. App. 2a & n.2. Moreover, at the risk of sounding like a broken record, the fact

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[4] The absence of evidence that respondents incurred any out-of-pocket expenses distinguishes this case from *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In that case, the attorneys' fees were actually incurred by the respondents in *defending* the "frivolous declaratory judgment action" (*id.* at 449 (citation omitted)) that had been brought against them as part of the petitioner's bad-faith scheme to wrest away their royalty rights and were awarded as *compensatory* damages for the tort alleged by the respondents.

[5] Respondents never complained to CE during the reclamation process about the runoff into their streams, but instead simply brought suit. Tr. 607-608. (Nor did any of the other plaintiffs. See Tr. 424, 431-432, 447-448, 462, 472-473, 493-494, 520-521, 563, 654, 964, 989.) It would be ironic if such behavior, which very possibly generated needless litigation, were regarded as justification for a disproportionate punitive/compensatory ratio.

that this case assertedly involves one of the exceptions to the low-ratio presumption identified in *BMW* makes it more, not less, worthy of review.

7. Respondents next assert (Opp. 20) that the determination of a constitutionally permissible ratio is "an inherently fact-bound issue which is not suitable for this Court's review." If this were a sufficient reason for denying certiorari, however, *BMW* itself should not have been reviewed. Nor, to take another of many possible examples, should the Court have granted review in the numerous search and seizure cases that have fleshed out for the lower courts such concepts as probable cause, consent, and exigent circumstances. Likewise, the Court has decided many "fact-bound" cases regarding the application of the four-part *Central Hudson* test for determining the allowable limits of government regulation of commercial speech. It is, indeed, almost a truism that one of the important ways in which this Court provides guidance to lower courts is by developing and applying legal principles in specific fact contexts. So, here, facts like those that frame the excessiveness issue in this case have given rise to competing rules of decision, and it is the essence of this Court's proper role to determine which of those competing, inconsistent decisional principles is correct.

8. Respondents argue at considerable length (Opp. 22-28) that the punitive damages are reasonable when compared to the amount CE allegedly saved by failing to adopt the various measures recommended by their expert at trial. They made this argument to this Court in their unsuccessful effort to defeat certiorari the first time this case was here. They made the argument again in the trial court as a basis for upholding the entirety of the then-$12 million punitive award, and the trial court implicitly rejected it. And they made it still again in the court of appeals in support of their argument that the $12 million punishment should be reinstated; it again received no judicial endorsement, even as a basis for approving a punitive award that is 100 times the compensatory damages. Thus, this

ground cannot be used as a basis for reconciling the Eleventh Circuit's ruling with the many cases rejecting high ratios.

Of course, were the Court to hear the case on the merits, respondents could trot out this argument again in an effort to justify the award.[6] But as with their other points, this wrinkle serves only to make this case an attractive vehicle for providing guidance on the reasonable relationship issue.

9. Respondents also assert (Opp. 28-29) that the punitive damages are reasonable when compared to the Georgia cap statute and the theoretical maximum penalty available under state law for environmental infractions. As for the former, it is hard to understand how a $250,000 cap provision that can be lifted upon a finding of a specific intent to cause harm can be said to give fair notice of a $1 million penalty any more than the general, cap-less common law of Alabama gave notice of a $2 million punishment in *BMW*. Plainly, that was not what the Court had in mind when it identified penalties for similar conduct as a guidepost.

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[6] In the lower courts, we laid out the numerous legal, factual and logical reasons why respondents' "avoided cost" argument is wrong. See, *e.g.*, Brief for the Appellant at 30-33 and Brief of Cross-Appellee and Reply Brief of Appellant at 34-38, *Combustion Engineering, Inc. v. Johansen*, 170 F.3d 1320 (11th Cir. 1999) (No. 97-8726). For present purposes, it suffices to point out that, even if it were constitutionally permissible (and we by no means concede that it is) to base a punitive award on avoided costs — without regard to the degree of reprehensibility of the conduct, the disproportionality of the punishment to any injury threatened or actually sustained, or the divergence of the punitive damages from the relevant civil penalty for the conduct at issue — the proper measure of avoided costs in this case would be the market value of a drainage easement, not the price tag of remediation techniques proposed for the first time at trial by the plaintiffs' expert (which, we note, far exceeds the market value of the entirety of all of the plaintiffs' properties). The plaintiffs adduced no evidence of this more appropriate measure of avoided costs.

As for the argument based on the statutory civil penalties, both the district court and the court of appeals expressly rejected the contention that the theoretical maximum supplies the appropriate figure for the third *BMW* guidepost. Pet. App. 23a-24a, 38a-39a. Respondents' disagreement with that interpretation of *BMW* serves to make this case more worthy of review, not less.

10. Finally, respondents contend (Opp. 29-30) that CE's wealth justifies the 100:1 ratio in this case. As indicated in the petition, however, the role of wealth in the excessiveness analysis is an issue that has confused and divided the lower courts. Respondents' reliance on wealth thus supplies an additional reason for granting certiorari, not denying it.

In sum, the significance to the excessiveness analysis of the kinds of factors identified by the courts below and advanced by respondents here is a source of recurrent and continuing disagreement and confusion. While no single case can bring total clarity to all aspects of the endeavor, it is hard to think of a better candidate than this case for taking a long stride down the road to more coherent and consistent administration of this very important aspect of constitutional law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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